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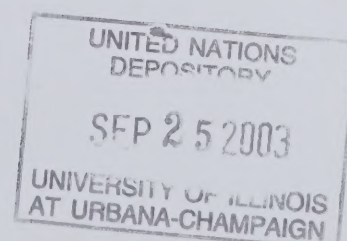
PREVENTION OF DISCRIMINATION

**PREVENTION OF DISCRIMINATION AND
PROTECTION OF MINORITIES**

**Progress report on the update to the study on peaceful and constructive
approaches to situations involving minorities submitted by Asbjørn Eide
in accordance with Sub-Commission resolution 2002/16***

* This document is submitted late so as to include the most up-to-date information possible.
The annex is circulated in the language of submission only.

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I. MANDATE AND BACKGROUND

1. By Sub-Commission resolution 2002/16 (para. 9), I was requested to provide, without financial implications, an update of my study on peaceful and constructive approaches to situations involving minorities (E/CN.4/Sub.2/1993/34 and Add.1-4) and to submit a progress report on the update to the Sub-Commission at its fifty-fifth session and the final report at its fifty-sixth session. Since this is not a study but more in the nature of a working paper, it will be brief.

2. In its resolution 1989/44, in which I was requested to prepare the earlier study, the Sub-Commission expressed concern that many of the situations brought to its attention involved questions of the assimilation, integration or autonomy of minorities, and it therefore wanted to examine possible ways and means to facilitate the peaceful and constructive resolution of situations involving racial, national, religious and linguistic minorities. The study was prepared from 1990 to 1993, against a sombre background. Ethnic and religious violence was erupting in numerous places, in parts of the former Soviet Union, in former Yugoslavia, and in several countries in Asia, Africa and in Central and South America.

3. The thrust of the study in 1993 was not solely to discuss minority rights, but to explore good guidelines for constructive relationships between the different groups in society. It contained an analysis of the dynamics of ethnic conflicts, pointing out that responsibility should be placed not only on Governments but also on overzealous ethnic conflict entrepreneurs, sometimes aided and abetted by their kin abroad and by diaspora groups settled in some of the Western countries. I argued that peaceful resolution of conflicts required an emphasis on at least three levels: better ensuring the rights of the individual human being, recognizing and protecting the existence and identity of minority groups, but also taking fully into account the concerns for public order in society as a whole. There may be conflicts between these different concerns; the task was and is to seek an appropriate balance between them.

4. The study also contained a review of developments in international law and organization since the Second World War relevant to minority issues and group accommodation. Three aspects were highlighted in that analysis: (i) the growing emphasis on equality and non-discrimination in the enjoyment by everyone of human rights; (ii) the emerging international attention to minority protection, which was then still at its beginning; and (iii) a renewed and intensified discourse on the right of peoples to self-determination and its relevance to minority protection.

5. The focus in this update is to set the stage for a discussion of guidelines for the application of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. The emphasis is on the application of its article 1, paragraph 1 of which reads:

“1. States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity.”

6. In this first part of the update, a review will be made of the framework for minority protection under international law, mainly addressing the requirements which are contained in universal human rights and therefore applicable under all circumstances, including when the minority concerned is not formally recognized in the country concerned. Minorities in many parts of the world face serious difficulties not because specific minority rights are not implemented, but because universal human rights are not properly respected and protected in relation to minorities. By universal human rights are here understood those rights which shall be enjoyed by every person, whether they belong to majorities or minorities. Those rights are contained in the Universal Declaration of Human Rights (UDHR) and are elaborated in the two International Covenants which together with the Universal Declaration constitute the International Bill of Human Rights.

7. It is therefore essential to underline that effective respect and protection of universal human rights would go a long way in meeting the needs of persons belonging to minorities. The need for specific minority rights are manifest particularly under three conditions: (i) when persons belonging to minorities are the subject of discrimination in the enjoyment of universal human rights or are not given equal protection by the law (the discrimination problem); (ii) when there is conflict over the use of universal human rights to assert a separate identity by minorities (the assimilation problem); or (iii) when the minority makes claims requiring special measures going beyond universal human rights (the autonomy problem).

8. This first part (submitted in 2003) deals mainly with the application of universal human rights to persons belonging to minorities, presenting the main framework for guidelines to be pursued. The second part, to be submitted in 2004, will contain an overview of policy options and obstacles encountered in securing constructive group accommodation. It will end with a set of conclusions and recommendations for future action.

II. THE IMPERATIVE FOUNDATIONS OF INTERNATIONAL ORDER: PEACE AND HUMAN RIGHTS

9. Constructive group accommodation through international protection of universal human rights and special minority rights must be built on the two basic pillars of international law and order, as set out in Articles 1 and 2 of the Charter of the United Nations: the maintenance of international peace and the promotion and protection of human rights.

10. The maintenance of peace requires respect for the sovereign equality of States and their territorial integrity, while the protection and promotion of human rights requires implementation of the rights listed in the Universal Declaration of Human Rights. The sovereignty of States is qualified by the degree to which human rights are respected and ensured.

11. The purpose of preserving and strengthening international and local peace has historically been a core concern in arrangements for minority protection. Early minority protection in Europe emerged out of peace settlements following wars and violence, initially related to religious conflicts and later to the break-up of empires and the formation of nation-States. Where ethno-nations came to be divided by State borders, this sometimes caused serious conflicts between kin States and home States. Ethnic tensions exploited by kin States contributed to the eruption of the Second World War. The significance of minority protection for the maintenance of peace is also illustrated by the fact that the main function of the

High Commissioner on National Minorities of the Organization for Security and Cooperation in Europe (OSCE) is to prevent international conflicts arising from grievances by minorities which have a kin State in the neighbourhood.

12. The United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities makes it clear in its preamble that one of the purposes is to preserve and strengthen domestic and international peace. The fifth preambular paragraph reads:

“Considering that the promotion and protection of the rights of persons belonging to national or ethnic, religious and linguistic minorities contribute to the political and social stability of States in which they live.”

13. Regarding international peace, we find the following formulation in the sixth paragraph:

“Emphasizing that the constant promotion and realization of the rights of persons belonging to national or ethnic, religious and linguistic minorities, as an integral part of the development of society as a whole and within a democratic framework based on the rule of law, would contribute to the strengthening of friendship and cooperation among peoples and States.”

14. It is important but not sufficient to recognize in domestic law the rights of persons belonging to minorities. They must also be respected and protected in practice. This requires not only political will, but also the capability to protect them adequately. What is clear from cases brought to the attention of the Working Group on Minorities is that there is a widespread lack of effective protection of the universal human rights of persons belonging to minorities. It can at times be difficult to determine whether the lack of protection is due to insufficient political will or to a lack of sufficient capability. To be able to ensure everyone's human rights, there must be a general human rights culture in society. Where there are serious shortcomings within society in the tolerance of diversity and in respect for the rights of others, the authorities have limited capability to enforce such respect. Furthermore, the authorities themselves can be affected to a greater or lesser extent by patterns of intolerance or discriminatory attitudes within parts of the public.

15. International human rights law implies that Governments are trustees, on behalf of the international community, for the protection of the human rights of everyone within their respective territories. Governments must therefore take the lead in ensuring the implementation of those rights, but they will not be successful until a general culture of human rights pervades the society as a whole, including both majorities and minorities.

16. Very often the choice of means used by minorities or opposition groups in conflict with the Government indicates on their side as well a lack of a human rights culture within their own ranks. Conflicts often degenerate into reciprocal violations of human rights, and it is obviously wrong to place all the blame on the government side. It is essential also to ensure that non-State actors respect and protect human rights, and more efforts are needed to find ways to ensure that

this happens. Nevertheless, in the international order as it exists today, the main responsibility rests on the State, and it is essential to hold every State accountable for ensuring that its choice of means when dealing with internal unrest are such that they respect and serve to protect human rights.

III. A NOTE ON DEVELOPMENTS SINCE 1993 AND REMAINING GAPS

17. The most significant innovation by the United Nations with respect to international law is the inclusion of human rights as a core component of that law. All States Members of the United Nations have by their ratification of the Charter undertaken to promote and encourage respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

18. When the previous study was initiated in 1990, there were few rules on minority rights in general international law. The main provision then existing in multilateral conventional law was article 27 of the International Covenant on Civil and Political Rights.

19. Influenced by the seriousness of the many ethnic and religious conflicts which emerged in the 1990s, there was a significant increase in standard-setting and the establishment of follow-up mechanisms. On 29 June 1990, the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Cooperation in Europe (CSCE)¹ adopted its concluding document, which in paragraphs 30 through 40 deals extensively with minority rights and State commitments for their protection. This served as an inspiration for the United Nations Commission on Human Rights to complete its drafting of the United Nations Declaration on Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (hereafter: the Minority Declaration), which was transmitted to the General Assembly and adopted on 18 December 1992.

20. The Declaration had no follow-up mechanism in place until the establishment of the Working Group on Minorities in 1995. The mandate of the Working Group as set out in Commission resolution 1995/24 is threefold: (a) to review the promotion and practical realization of the Minority Declaration; (b) to examine possible solutions to problems involving minorities, including the promotion of mutual understanding between and among minorities and Governments; (c) to recommend further measures, as appropriate, for the promotion and protection of the rights of persons belonging to national or ethnic, religious and linguistic minorities.

21. The Working Group has chosen a flexible approach to encourage wide participation in its sessions. Not only Governments, but also minorities, non-governmental organizations and intergovernmental organizations take part as observers with full speaking rights and the right to submit proposals.

22. The Working Group is neither a monitoring body in a formal sense of the word, nor a mechanism for handling complaints. Consequently, there are still serious gaps in ensuring compliance with minority rights. Proposals have been elaborated for the appointment of a United Nations special rapporteur on minority rights, or a special representative of the

Secretary-General, primarily with a conflict-prevention mandate. Other suggestions are also being examined, a review of which will be contained in the final report submitted in 2004.

23. Stronger mechanisms for the protection of minorities have been established at the regional level in Europe. The OSCE established in 1992 a special office, the High Commissioner on National Minorities, whose mandate was elaborated in the Helsinki Summit document in 1992. It is to provide early warning and, as appropriate, early action in regard to tensions involving national minority issues which have the potential to develop into a conflict within the OSCE area, affecting peace, stability or relations between participating States and requiring attention by the Senior Council of OSCE. The office was held for nearly a decade by Max van der Stoep, who achieved considerable success in many situations which might have erupted into open violence.

24. The High Commissioner's task is conflict prevention, not the protection of minorities, but in practice he and his Office have made major contributions in increasing the awareness and acceptance of minority rights and in developing practical guidelines for the implementation of such rights.

25. Within the Council of Europe, the European Charter for Regional and Minority Languages was adopted, followed in 1994 by the European Framework Convention for the Protection of National Minorities, which entered into force in 1998. It has now 35 European States parties. Article 1 states that the protection of national minorities is an integral part of international protection of human rights. An Advisory Committee on the Framework Convention on National Minorities has been established with the task of examining the reports which the participating States are required periodically to submit and to formulate the opinion of the Advisory Committee on the implementation by the State party of its obligations under the Framework Convention. The Advisory Committee has also established the practice of visiting each of the participating States, conducting interviews with minorities, non-governmental organizations and government officials. While such visits can be undertaken only upon the invitation to do so from the Government concerned, in nearly all cases such invitations have been forthcoming.

IV. MINORITY ISSUES BEYOND EUROPE

26. There are no explicit regional instruments for minority protection outside Europe. This is regrettable, taking into account that while the issues are often in many ways different, they are no less urgent in Africa, Asia, the Pacific or in the Americas.

27. The Working Group has prepared a series of regional seminars in collaboration with other institutions. One of these, held in La Ceiba, Honduras, focused on the situation of Afro-descendants in the Americas. The primary concern of Afro-descendants is to create awareness of the discrimination to which they have often been subjected and to develop a comprehensive agenda for the elimination of that discrimination and its after-effects.

28. The Working Group has collaborated with the Sub-Commission's Working Group on Indigenous Populations in organizing three subregional seminars in Africa: one for West Africa in Kidal, Mali; a second for Central and Southern Africa in Arusha, United Republic of Tanzania; and a third in Gaborone, Botswana. These seminars have given considerable insight

into the special issues concerning minority and indigenous situations in Africa. One significant issue is the relationship between pastoral people and settled agriculturalists, which affects conceptions of individual versus collective control over land and natural resources. Another set of problems applies to groups that rely on hunting and gathering and that are threatened by the growing impact of game-hunting tourism. The lessons to be drawn from these insights will be further elaborated in the final report.

29. In December 2002, the Working Group organized a seminar for South-East Asia, held in Chiangmai, Thailand, with participation by minorities from nearly all the countries in the region. Among the insights derived from the seminar was the complicated relationship between the rice-growing farmers mainly settled in the valleys and the forest and mountain minorities whose way of life was considerably different from that of the dominant majorities.

30. While there have been significant developments in the regional mechanisms in Europe, there is no regional mechanism directly addressing minority issues in place outside Europe. The United Nations treaty bodies have some, but limited, roles to play throughout the world, but minority issues are quite peripheral parts of their mandates. The Working Group on Minorities is of great importance as a forum and an exploratory body, but it has little power to act in case of serious violations.

31. The Commission on Human Rights, in its resolution 2003/50 (para. 17), requested the High Commissioner to examine existing mechanisms with a view to enhancing their cooperation and effectiveness and to identify possible gaps in the protection of the rights of persons belonging to national or ethnic, religious and linguistic minorities. The High Commissioner is requested to report to the Commission at its sixtieth session in 2004.

V. MINORITY CONCERNS AND THE CONCEPT OF "MINORITY"

32. The concerns held by national or ethnic, religious and linguistic minorities can be described as follows:

(a) Equal treatment of everyone as individuals in the enjoyment of human rights, which is a common concern to all of them;

(b) Preservation and development of identity in otherwise integrated societies, which is a matter of high priority for some of them but of lower importance of others until after they have received proper equal protection of their ordinary human rights;

(c) Effective participation while maintaining their own identity. General, effective participation in the affairs of the country as a whole as well as in matters affecting the group is of high importance for large and closely knit minorities, while smaller or more dispersed groups are concerned mainly with effective participation in decisions on matters concerning them;

(d) Access to or control of land. For some territorially localized minorities, great importance is given to effective control over their land and natural resources and effective influence on development projects or activities, particularly when they have a way of life and a way of using natural resources which differ from those of the dominant society;

(e) Cultural autonomy in fields such as language and education, which can be of great importance for large but somewhat dispersed groups; and

(f) Territorial autonomy, often combined with cultural autonomy, for sizeable groups which live compactly together in a part of the territory.

33. States are not always able to meet all these requirements, and some of the demands go beyond what is compatible with other aspects of international law. Two points need to be underlined here: States are at all times obliged to ensure the enjoyment by everyone of their individual human rights; States cannot transfer so much autonomy to minorities that the State is deprived of its authority and capability to ensure human rights within its territory, and thus also the human rights of those who live inside the autonomous area. The responsibility of the State to ensure to everyone the enjoyment of human rights is a general obligation under international human rights law. It is reflected also in the Minority Declaration in its article 8, paragraph 2 of which states that the exercise of the rights set forth in the Declaration shall not prejudice the enjoyment by all persons of universally recognized human rights and fundamental freedoms. Moreover, the Declaration states in article 8, paragraph 4, that nothing in the Declaration may be construed as permitting any activity contrary to the purposes and principles of the United Nations, including sovereign equality, territorial integrity and political independence of States.

34. There is probably no country in world in which there is no minority at all. The Human Rights Committee in its general comment No. 23 (see below) has taken the position that the existence of an ethnic, religious or linguistic minority in a given State party does not depend upon a decision by that State party but requires to be established by objective criteria. This leaves open what those objective criteria are. The minimum consensus is that the word "minority" refers to the existence of a group of persons who differ from the majority in society, or from a coalition of other groups, by having a different culture, a different language, or a different religion. It is now broadly agreed that the word "ethnic" refers essentially to a common culture and does not require, but also does not exclude, that there is a common genetic basis; that the persons belonging to the group descend from the same forbears.

35. If the minority concern simply is equal treatment of everyone as individuals in the enjoyment of human rights, there is no need for any other criterion. If, however, their concern includes the preservation and development of their group identity in otherwise integrated societies, this becomes a second and subjective element in defining minorities: that the persons belonging to ethnic, religious or linguistic groups are motivated to maintain that identity. But that is their choice, which does not depend on any recognition by the State concerned, and it is a choice which to a large extent can be achieved through proper respect and protection of universal human rights.

36. Article 27 of the International Covenant on Civil and Political Rights is often referred to as containing minority rights. Strictly speaking, it does not do much more than stipulate that in those States where minorities exist, persons belonging to minorities are entitled to enjoy their universal human rights in community with others. But what does the word "exist" imply? Which groups can be held to exist in a given country?

37. One aspect of the question was dealt with by the Human Rights Committee in its general comment No. 23, on the interpretation of article 27 of the International Covenant on Civil and Political Rights:

“Article 27 confers rights on persons belonging to minorities which ‘exist’ in a State party. Given the nature and scope of the rights envisaged under that article, it is not relevant to determine the degree of permanence that the term ‘exist’ connotes. Those rights simply are that individuals belonging to those minorities should not be denied the right, in community with members of their group, to enjoy their own culture, to practise their religion and speak their language ...”

38. The Committee’s view is based on the argument that the nature and scope of the rights envisaged under that article make it irrelevant to determine the degree of permanence that the term “exist” connotes. This is in line with my proposition stated above, that article 27 does not do much more than to remind States that the individual human rights to freedom of expression, freedom of religion and cultural rights shall be enjoyed also by persons belonging to minorities and can be exercised in community with others.

39. When the reference is to rights that do not go further than those set out in article 27, there is no need to make a distinction between “old” and “new” minorities: there is no need to distinguish between persons belonging to ethnic, religious or linguistic groups made up of recent immigrants, and those groups which are established for a long time. If, however, rights go further than that, it may be necessary to restrict the range of beneficiaries.

40. There has been an extensive debate on the need for a definition of minorities in order to determine whether such minorities do indeed exist in a particular country. A general, legal definition of minorities does not now exist, and in the opinion of the present author it is not necessary or desirable, and can even be potentially harmful. It is not necessary, because it is not difficult in practice to find out whether there is a minority situation requiring measures to be taken. If these are not taken, it is not due to a problem of definition but rather of the lack of political will or capability to act. A legal definition is not desirable and is potentially harmful, because a general definition would easily lead to the assumption that all minorities falling within that definition would be entitled to all minority rights, and that all groups falling outside are entitled to none of the minority rights. Both of these assumptions are wrong, as will be shown below. The drawn-out debate on a definition of “minority” has overshadowed the fact that the major problem facing many minorities is the lack of respect for and, particularly, the weak or sometimes non-existing protection of their universal human rights.

41. For the purpose of enjoying universal human rights in community with others, there is no need for a strict and narrow definition of the concept of minorities. When the rights consist in claims on the State to adopt special measures to ensure appropriate conditions for the preservation and development of the group identity, it may be necessary to use a more restrictive definition of the beneficiaries of such “claim rights”. Some such rights can be found in the Minority Declaration and in regional instruments such as the European Framework Convention and the OSCE Copenhagen Document of 1990, but those instruments also contain rights which do not go beyond what follows from universal human rights.

42. It is therefore irrelevant to make a general distinction between “old” and “new” minorities. Everyone is entitled to enjoy most of the universal human rights, including when exercised in community with others and therefore de facto minority rights, but not everyone is entitled to all the rights which can be grouped under the heading of minority rights. Some rights can be limited to citizens while others cannot. Some rights, such as the right to use one’s own language in relations with the authorities, can be claimed by persons belonging to groups which live compactly together in a particular area, but not by persons belonging to dispersed groups, whether they are “old” or “new”.

43. The distinction between “old” and “new”, whenever relevant, should not in general terms be drawn on the basis of citizenship. There are many and different reasons why some groups of persons do not have citizenship. They can still be “old” minorities with a justified claim on positive measures, but the lack of citizenship can block them from some minority rights, in particular the right to effective participation in political decision-making in the country concerned. This will be further discussed in the final report.²

44. The following paragraphs will first examine the significance of the respect for and protection of universal human rights, normally referred to as rights of “everyone” and thus individual rights, in relation to persons belonging to minorities and therefore addressing points (a) and (b) of the minority concerns listed above in paragraph 32. This will be followed, in the next phase of the report, by an examination of constructive approaches to implementing more extended rights, consisting in claims for special measures to safeguard and strengthen the identity of the group as such, as listed in points (c) to (f) of paragraph 32.

VI. UNIVERSAL HUMAN RIGHTS AS THE FOUNDATION FOR MINORITY PROTECTION

45. At the base of minority rights are the universal human rights as set out in the Universal Declaration and elaborated in the main conventions (International Covenant on Civil and Political Rights (ICCPR); International Covenant on Economic, Social and Cultural Rights (ICESCR); International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); Convention on the Rights of the Child (CRC); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)). It is necessary to keep in mind that some minority rights require protection as general human rights, bearing in mind that those rights are applicable to persons belonging to any group within the country, even when the group is not recognized as a minority by the State concerned.

46. While not all States are parties to the two Covenants, all States Members of the United Nations are legally bound by its Charter and must therefore be guided by the Universal Declaration of Human Rights, which specifies the rights referred to in general terms in the Charter.

47. Under ICCPR, article 2, States have undertaken to respect and to ensure to all individuals within its territory the rights contained in the Covenant. The obligations are both negative and positive in nature. States parties must not only themselves refrain from violation of the rights

guaranteed in the Covenant, but the obligation to ensure those rights implies, if the need arises, the use of positive measures in order to protect the enjoyment of the rights against other, private parties. To do so, the State must adopt the necessary legislative, administrative and other measures to achieve that aim.

48. Under ICESCR, article 2, States have undertaken to take steps to the maximum of available resources to achieve progressively the full realization of the rights. This imposes an obligation to move as expeditiously as possible towards that goal. States must immediately identify the vulnerable groups and set benchmarks for the progressive realization, step by step, of the rights contained in that Covenant for everyone under its jurisdiction. As pointed out by the Committee on Economic, Social and Cultural Rights in several of its general comments, the rights contained in the Covenant impose three types or levels of obligations on States parties: the obligations to *respect*, to *protect* and to *fulfil*. In turn, the obligation to fulfil incorporates both an obligation to *facilitate* and an obligation to *provide* the rights listed there.

49. While the rights in the Universal Declaration and the Covenants are formulated as the rights of individuals, the respect for and protection of those rights go a long way in guaranteeing minority protection. In addition, some of the rights are mainly enjoyed in community with others of the same group. To the implications of this for minority protection we now turn.

50. The principle of non-discrimination is of particular importance in this regard. It is of general applicability, elaborated in many human rights instruments and set out also in the Minority Declaration (art. 4.1), which requires States to take measures where required to ensure that persons belonging to minorities may exercise fully and effectively their human rights and fundamental freedoms without any discrimination and in full equality before the law.

VII. MINORITY PROTECTION THROUGH UNIVERSAL HUMAN RIGHTS

51. The first requirement on States in regard to minorities is to respect and protect their existence. This includes their physical existence, their continued existence on the territories on which the minorities live and, with some qualifications, also the continued access to the material resources required to continue their existence on those territories. They shall neither be physically excluded from the territory nor be excluded from access to the resources required for their livelihood.

52. Protection of their right to existence is implicit in universal integrity rights contained in the Universal Declaration and the corresponding provisions in relevant conventions, starting with the right to life, freedom from torture and cruel and inhuman treatment, and freedom of movement and residence.³ In the most serious cases, failure to respect and protect the physical existence would fall under the crime of genocide and the Rome Statute of the International Criminal Court.

53. Persons belonging to minorities are entitled, in the same way as other members of society, to set up any association they may wish. Persons belonging to minorities also have an uncontested right to use their own language in relation to any willing listener or reader and in their commercial activities. This follows from the freedom of expression and information⁴ which includes a right to choose one's language of expression and information.

54. The freedom of religion is also a universal human right and can therefore be used by persons belonging to any religious group to practise their religion. States are under an obligation to respect these freedoms and to protect those who practise them against harassment and violence. Limitations on the freedom of association, expression and information, or on religious practice, can only be limited under the grounds recognized in the international instruments. Such limitations must be prescribed by law and be necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

55. Persons belonging to minorities are also entitled, without discrimination, to enjoy economic and social rights: the right to have access to work freely chosen, rights in work, social security, right to an adequate standard of living, right to the highest attainable standards of health, right to education and the enjoyment of cultural rights.

VIII. THE IMPORTANCE OF EQUAL PROTECTION, EFFECTIVE REMEDIES AND NON-DISCRIMINATION

56. As previously mentioned, States are obliged to respect and to protect the universal human rights discussed above. It is important to recognize and ensure that everyone has a right to an effective remedy against violations of those rights. Under ICCPR, article 2.3, each State party to the Covenant has undertaken to ensure that any person (thus also those belonging to minorities) whose rights have been violated has an effective remedy and to ensure that any person claiming such a remedy shall have her or his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system, and to ensure that the competent authorities enforce such remedies when granted. Furthermore, under ICCPR, article 26, and UDHR, article 7, all persons are entitled without discrimination to equal protection of the law.

57. The experience of the Working Group on Minorities shows that many of the issues brought to its attention have arisen where there has been a lack of equal and adequate protection. A major problem has been unequal treatment by law enforcement officials at various levels, sometimes with the connivance of the central authorities, at other times owing to a lack of sufficient efforts by the central authorities to intervene to ensure equal protection by the law enforcement agencies.

58. When the authorities, through negligence or outright, deliberate refusal, fail to provide equal protection, there is a serious risk that some members of minority groups may take the law in their own hand, starting to retaliate against real or alleged violations committed by members of the majority.

59. Under ICESCR, article 2.2, States parties have undertaken to guarantee that the economic, social and cultural rights will be exercised without discrimination. Many cases have been brought to the attention of the Working Group of minorities facing much greater difficulties than members of majorities in enjoying their economic, social and cultural rights. When there is serious inequality in the enjoyment of those rights, the affected minorities may lose their belief in the legitimacy and responsiveness of the Government and start to demand greater self-control, autonomy, or outright secession.

60. Under both of these circumstances, the unrest can easily facilitate the mobilization of conflict by ethnic entrepreneurs, and the slippery road to ethnic or religious conflict can quickly become unmanageable.

IX. ON ASSERTION OF PLURALISM OR DIVERSITY THROUGH UNIVERSAL HUMAN RIGHTS

61. While universal human rights are formulated as the rights of everyone as individual human beings, many of them are usually enjoyed in community with others and can therefore respond to the needs of many minorities.

62. One of these is the freedom of religion and belief, mentioned above, which entitles every minority to profess, practise and manifest their own religion or belief.⁵ This implies a right to establish their own institutions to practise their religion or belief and to establish and run their own associations for that purpose. It includes the right to worship in community with others, to establish places for that worship, and the right to publish and disseminate their own religious materials and train or appoint their own religious leaders. Regardless of whether special minority rights exist or the minority is recognized, States have a general duty to respect that freedom and to protect those who practise their religion against harassment and violence.

63. Another of these rights is the freedom of expression and information, which is mostly carried out through the use of spoken or written language. Part of that freedom is the right of persons belonging to linguistic minorities to use their own language in any communication among themselves, be it orally or in writing, including through electronic media. They can, of course, also use their own language in any communication with any other willing listener or reader. The right to use their own language in these respects does not depend on any special minority right - it is part of universal human rights. Their use of their own language cannot be prohibited. The content of communication can be limited, but only on the same grounds as restrictions on the content of expression and information in the majority language(s): when the limitations are provided by law and are necessary for the respect of the rights of others or the protection of national security or public order, public health or morals. It needs to be repeated, however, that the choice of language, including the use of one's own, cannot be prohibited as such - it would be a discriminatory act under international law and thereby a violation of human rights.

64. A different matter is to what extent a person belonging to a linguistic minority is entitled to use her or his own language in relations with public authorities. As a general rule, States can, without violating universal human rights, require that all correspondence or communication with public authorities and all documentation be in the official language(s). Only where there are special minority rights applicable in particular contexts can minorities claim a right to communicate with the authorities in the minority language.

65. Yet another question is whether a person belonging to a linguistic minority has a right to learn her or his language. States can also impose a duty on persons belonging to minorities to learn the official language in school, but cannot, without violating important aspects of the right to education, prohibit privately funded or organized learning of another language. Universal human rights do not, however, include a general right to obtain publicly funded education in that language; that can only be demanded where specific minority rights exist.

X. FREEDOM OF ASSOCIATION

66. The right to freedom of association is set out in UDHR, article 20, and in ICCPR, article 22 (“everyone shall have the right to freedom of association with others”). It is also set out in the regional instruments, and is an essential component of universal human rights.

67. The term “association” presupposes an organized, voluntary grouping for a common goal. Freedom of association is both a civil and a political right, and is eminently suited to protect and promote the cultural identity and interests of minorities. Freedom of assembly and freedom of association, together with the freedom of expression, provide the basis for defending those interests in community with others. Minorities need their freedom to communicate with each other, to assemble and to organize. Otherwise they would run serious risks of being subjected to discrimination, prevented from asserting their identity, and limited to the exclusive use of the language of the majorities in the societies in which they live.

68. The State shall normally not interfere with the existence or activities of associations. Their existence is a result of their free decision, and the State is duty bound to allow the establishment and maintenance of voluntary associations, including those whose major purpose is to protect and develop the culture of a minority group. The State may legitimately require registration of associations, but that can generally only be in order to ensure the legitimate purposes of public order. The most common purpose of registration is to ensure that the statutes of the association provide for the economic aspects of the association in a proper way.

69. The State does have a regulatory function, which can be exercised by requiring the registration and submission of statutes demonstrating the association’s purpose, organs and financing. The sole purpose of such requirements must be to ensure orderly conduct; they cannot be used to restrict the right to set up or run the association beyond what follows from the international instruments. ICCPR, article 22, requires that limitations or restrictions must be prescribed by law, be necessary in a democratic society, and be solely in the interest of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.

70. Prohibition of associations is permissible only for State-threatening associations - those violating article 20 of ICCPR, in particular paragraph 2 which prohibits the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, and those whose activities aim at the destruction of human rights in the sense of article 5 of ICCPR.⁶

71. Total prohibition of a particular voluntary association is therefore permissible only under very special circumstances. But even when the association cannot be prohibited, the State can prohibit certain activities when this falls under the permissible limitations set out in ICCPR, article 22.

72. Persons belonging to any minority, including those which are new in the country or which are not recognized as a minority by the Government concerned, are free to set up and run voluntary associations. The practice of the European Court of Human Rights clearly confirms this.⁷

XI. THE RIGHT TO EDUCATION

73. Everyone has a right to education (UDHR, art. 26; ICESCR, art. 13). Persons belonging to minorities, like all others, are also entitled to establish private educational institutions. In practice, however, the majority of primary, and often secondary and vocational, educational institutions in most countries are run by the State.

74. While persons belonging to minorities shall not be discriminated against in their access to education, a much larger and more complex issue is to what extent they can demand that their identity and culture be taken into account in the educational process. The process of education has a profound impact, positively or negatively, on a young person's sense of identity. Education can break down the identity shaped by the cultural environment into which the child is born and can leave the person humiliated and culturally disoriented; but education can also help to strengthen and further develop that identity while creating awareness and tolerance of other cultures existing in the same society.

75. The Working Group has given considerable attention to this issue, based in part on a working paper by its member, José Bengoa.⁸ It has noted that education in the past often served the purpose of assimilation. Members of the Working Group have pointed out that assimilation in itself is negative and forced assimilation amounts to serious discrimination. While it appears at times to be a natural process towards assimilation into the dominant culture, members of the Working Group have argued that experience in recent decades has demonstrated that when a minority shows a willingness to assimilate, it is usually a result of existing cultural pressures that prevent it from developing its own culture.

76. The content of education is therefore important for constructive minority policies, but many, and partly conflicting, considerations have to be taken into account.

77. Under the Convention on the Rights of the Child, which has been almost universally ratified, article 29 sets out the purposes which should guide the content of education. By ratifying the Convention, the States parties agree that the education of the child shall be directed to the development of respect for human rights and fundamental freedoms and for the principles enshrined in the Charter of the United Nations. Education shall further promote the development of respect for the child's parents, his or her own cultural identity, language and values; for the national values of the country in which the child is living and the country from which he or she may originate; and for civilizations different from his or her own. The child shall be prepared for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of the sexes and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin. Education shall also aim at the development of respect for the natural environment.

78. One overriding concern, set out in paragraph 1 of article 29, is the development of the child's personality, talents, and mental and physical abilities to their fullest potential. There is a need for a balance between receiving an education which places great emphasis on minority interests, and the need to be taught subjects which are of value for later life. Educational policies must therefore combine a focus on the universal values, the practical needs of the child, and the respect for separate cultural traditions and identities.

79. Under the Minority Declaration, article 4, States should, where appropriate, take measures in the field of education, in order to encourage knowledge of the history, traditions, language and culture of the minorities existing within their territory. Persons belonging to minorities should have adequate opportunities to gain knowledge of the society as a whole. The State has a role in ensuring that educational curricula reflect the culture of both minorities and majorities.

80. Migrants and their families, who have to adapt to the customs and school system of the host country, should nevertheless be able to maintain their characteristics. Education can play a crucial role in shaping their new identity while redefining - but maintaining links with - the society from which the voluntary migrants migrated. Such minorities should, therefore, in accordance with article 29 of the Convention on the Rights of the Child, be entitled to education both about their culture of origin and that of their host culture.

81. These issues raise the much larger question of multiculturalism, interculturalism and transculturalism in the process of education, a theme which will be developed at greater length in the final report.

XII. CULTURAL RIGHTS AND RIGHTS IN LAND OR NATURAL RESOURCES

82. Under UDHR, article 27, everyone has the right freely to participate in the cultural life of the community. States parties to ICESCR have, under its article 15, recognized the right of everyone to take part in cultural life. Under ICESCR, article 27, persons belonging to minorities shall not be denied the right to enjoy their own culture. There is no doubt, therefore, that minorities are fully entitled under universal human rights to preserve and develop their own culture. This does not depend on recognition by the State, and it is not limited to persons who are citizens of the country concerned.

83. The right to enjoy their culture is already covered to a large extent by the right of minorities to use and learn their own language and the right to practise their own religion and belief. But the preservation of culture can require much more, and it is therefore a matter of greater controversy how far these rights should go for different categories of minority. The Human Rights Committee, in its general comment No. 23 addressing the interpretation of the sentence in article 27 that "persons belonging to ... minorities shall not be denied their right to enjoy their own culture", observed that

"... culture manifests itself in many forms, including a particular way of life associated with the use of land resources, [especially] in the case of indigenous peoples. That right may include such traditional activities such as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them."

84. We are dealing here with a right which has some facets that shall be enjoyed by everyone as a universal human right, but also some facets which are applicable also to more specified groups. The Human Rights Committee refers in particular to the cultural rights of indigenous peoples, whose rights have been further elaborated in ILO Indigenous Peoples and Tribal Peoples Convention, 1989 (No. 169), and in the draft United Nations declaration on the rights of

indigenous peoples prepared by the Sub-Commission and now under discussion in the Commission on Human Rights. But there are other groups which have the same or similar needs, even if they are not recognized as indigenous peoples.

XIII. CONCLUDING REMARKS AND OUTLINE OF ISSUES FOR THE NEXT REPORT

85. The framework for constructive group accommodation through minority protection is set by the dual concern with the maintenance of international peace and the promotion and protection of universal human rights.

86. Many of the concerns of minorities can be met through the responsible application and protection of universal, individual human rights. They should be protected against any discrimination in their enjoyment of the whole list of rights set out in the Universal Declaration. They are also entitled to use those rights to preserve their own cultural identity, if they so wish. In general, these rights apply to all, even those not recognized as a minority, and even if they are not citizens (with a few exceptions).

87. The major problem for many minorities around the world is a lack of political will or capability on the part of the State to respect and, particularly, to protect those rights. When discrimination is rampant or protection of minorities weak, a natural reaction will be to demand other forms of safeguards - more effective participation, or outright autonomy.

88. There are also many other minority concerns which cannot be fully handled by the application of universal, individual rights. One of these is the right to maintain a particular way of life and therefore to follow particular ways of controlling land or natural resources. Another set of concerns are those which require public spending by the Government or acceptance by the State of particular restrictions which do not apply in their relations to members of other groups in society. States do not necessarily have obligations to fulfil these rights by positive or special measures, unless some additional requirements are also fulfilled. When such special measures or special arrangements are called for, they can be demanded only by particular groups in particular settings, and therefore require moving beyond universal human rights.

89. In the final part of this report, some of those more difficult questions will be examined at greater length, based on the experiences gained by the Working Group and in the regional seminars held in different parts of the world. The main focus will be on the policy requirements necessary to foster conditions for the promotion of identity, as required by the Minority Declaration.

90. The final update will examine lessons learned concerning:

- (a) Integrative and autonomous approaches;
- (b) Effective participation by and consultation of minorities;

- (c) **The issue of a right to citizenship as a condition for effective participation;**
- (d) **Land rights;**
- (e) **Educational rights in different contexts;**
- (f) **The right to development of those minorities that have a particular way of life.**

91. **It will also review the role of international agencies in responding to minority concerns: the role of UNDP, the financial institutions and other international agencies.**

92. **Finally, it will review the international mechanisms for promotion and protection of minority rights both at the level of the United Nations (treaty bodies, Charter mechanisms and their reference to minority issues) and at the regional level, in order to identify the gaps and the need for strengthening the protection.**

93. **It will end with a set of conclusions and recommendations for future work.**

Notes

¹ Renamed the Organization for Security and Cooperation in Europe in 1994.

² See also Asbjørn Eide, *Citizenship and the minority rights of non-citizens*, (E/CN.4/Sub.2/AC.5/1999/WP.3).

³ UDHR articles 3, 5, 13; ICCPR articles 6, 7, 12.

⁴ UDHR article 19, ICCPR article 19.

⁵ UDHR article 18, ICCPR article 18.

⁶ See M. Nowak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary* (Kehl/Strasbourg/Arlington: N.P. Engel, 1993), p. 394 at para. 21.

⁷ *Sidiropoulos and others v. Greece*, Application No. 26695/95, European Court of Human Rights, Case 57/1997/841/1047, *Reports 1998-IV*.

⁸ *Education and minorities* (E/CN.4/Sub.2/AC.5/1996/WP.3).

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